

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENT TO SUPREME COURT RULE 28, SECTION 9(D)

M2003-01514-SC-RL2-RL - Filed August 25, 2003

ORDER

In an order filed June 19, 2003, this Court solicited written comments from the bench, bar, and public regarding a proposed amendment to Supreme Court Rule 28, Section 9(D). The order specifically directed the Appellate Court Clerk to provide a copy of the proposed amendment to the Tennessee Attorney General's Office, the Tennessee District Public Defenders' Conference, and the Tennessee District Attorneys' General Conference. The deadline for submitting written comments expired on August 1, 2003. The Court appreciates the comments and suggested revisions submitted by the Tennessee Attorney General's Office.

Upon due consideration, this Court hereby amends Supreme Court Rule 28, by deleting current Section 9(D) in its entirety and adopting revised Section 9(D) which is attached hereto as Exhibit A.

It is so ORDERED.

FOR THE COURT:

FRANK F. DROWOTA, III,
CHIEF JUSTICE

EXHIBIT A

Rule 28, Section 9(D) –Grant of Delayed Appeal.

(1) By the Trial Court

(a) Appeal as of Right Pursuant to Rule 3, Tennessee Rules of Appellate Procedure –

Upon determination by the trial court that the petitioner was deprived of the right to file an appeal pursuant to Rule 3, Tennessee Rules of Appellate Procedure, the trial court shall apply the procedures set out in Tennessee Code Annotated section 40-30-213.

(b) Appeal Pursuant to Rule 11, Tennessee Rules of Appellate Procedure –

(i) Upon determination by the trial court that the petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, the trial court shall enter an order granting the petitioner a delayed appeal, staying the post-conviction proceedings pending the final disposition of the delayed appeal, and providing that the order is final for purposes of appeal under this rule.

(ii) The State may appeal to the Court of Criminal Appeals as of right from the trial court's grant of a delayed appeal by filing a notice of appeal with the trial court clerk within thirty (30) days of entry of the trial court's order granting the delayed appeal. The appeal shall then proceed in accordance with the Tennessee Rules of Appellate Procedure as in any appeal as of right. If the Court of Criminal Appeals does not reverse the trial court's order granting a delayed appeal, the State may file an application for permission to appeal under Rule 11, Tennessee Rules of Appellate Procedure, and the case shall then proceed in accordance with that rule until final disposition by the Supreme Court. If the State does not file a Rule 11 application, the petitioner has sixty (60) days from the issuance of the mandate of the Court of Criminal Appeals to file the delayed Rule 11 application with the Supreme Court. If the State files a Rule 11 application, but the Supreme Court denies the application or grants the application but does not reverse the trial court's order granting a delayed appeal, the petitioner shall have sixty (60) days from the issuance of the mandate of the Supreme Court to file the delayed Rule 11 application.

(iii) If the State chooses not to appeal the trial court's grant of a delayed appeal, the State shall file a notice of its intention not to appeal within thirty (30) days of entry of the trial court's order granting a delayed appeal. The petitioner has sixty (60) days from the date of filing of this notice to file the delayed Rule 11 application. In the event the State fails to file this notice, the delayed Rule 11 application will be considered timely if filed within ninety (90) days of entry of the trial court's order granting a delayed appeal.

(iv) Upon the filing of a delayed Rule 11 application in accordance with this rule, the Appellate Court Clerk shall immediately reinstate the original appeal on the docket

and serve notice on all parties. The case shall then proceed in accordance with Rule 11, Tennessee Rules of Appellate Procedure.

(2) By the Appellate Court

(a) Appeal as of Right Pursuant to Rule 3, Tennessee Rules of Appellate Procedure –

If the trial court determines that the petitioner was not deprived of the right to appeal pursuant to Rule 3, Tennessee Rules of Appellate Procedure, this ruling may be challenged as part of any Rule 3 appeal from the trial court's final judgment in the post-conviction proceedings. The Court of Criminal Appeals shall consider and resolve this issue along with any other issues raised in the post-conviction appeal. Should the Court of Criminal Appeals grant a delayed appeal, the post-conviction appeal shall not be stayed; instead, any party may challenge the decision of the Court of Criminal Appeals, or any portion thereof, by filing an application for permission to appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure.

(b) Appeal Pursuant to Rule 11, Tennessee Rules of Appellate Procedure –

(i) If the trial court determines that the petitioner was not deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, this ruling may be challenged as part of any Rule 3 appeal from the trial court's final judgment in the post-conviction proceedings. The Court of Criminal Appeals shall consider first the trial court's denial of the delayed appeal before resolving other issues raised in the post-conviction appeal. If the Court of Criminal Appeals determines that the trial court properly denied the request, the Court of Criminal Appeals shall dispose of the remaining issues in the post-conviction appeal. If, however, the Court of Criminal Appeals determines that the trial court erred in denying the delayed appeal, the Court of Criminal Appeals shall enter an order granting the petitioner a delayed appeal and staying the post-conviction proceedings pending the final disposition of the delayed appeal.

(ii) If the Court of Criminal Appeals grants a delayed appeal, the State may file an application for permission to appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, within sixty (60) days from the date of the filing of the order of the Court of Criminal Appeals. The case shall then proceed in accordance with Rule 11. If the Supreme Court denies the Rule 11 application or grants the application but does not reverse the intermediate court's order granting a delayed appeal, the petitioner shall have sixty (60) days from the issuance of the mandate of the Supreme Court to file a delayed Rule 11 application. If the State does not file a Rule 11 application, the petitioner has sixty (60) days from the issuance of the mandate of the Court of Criminal Appeals to file the delayed Rule 11 application with the Supreme Court.

(iii) Upon the filing of a delayed Rule 11 application in accordance with this rule, the Appellate Court Clerk shall immediately reinstate the original appeal on the docket and serve notice on all parties. The case shall then proceed under Rule 11, Tennessee Rules of Appellate Procedure.

(3) New Issues Resulting from Delayed Appeal

(a) Where a delayed appeal is granted and the petitioner is unsuccessful on appeal, and new issues cognizable in a post-conviction proceeding result from the handling of the delayed appeal, the petitioner may amend the original post-conviction petition to include such new issues.

(b) Where the post-conviction appeal has been stayed in the Court of Criminal Appeals, the case may be remanded to the trial court for the taking of evidence on any new issues resulting from an unsuccessful delayed appeal.